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ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDRESITA BOYLE, individually and on
 behalf of all others similarly situated,

Plaintiff,

v.

ARROW FINANCIAL SERVICES LLC;
 NELSON, WATSON & ASSOCIATES, LLC;
 RONALD LAVIN, an individual,

Defendants. /

Case No.: CV 08-3381 PJH

PLAINTIFF'S OPPOSITION TO
 DEFENDANT'S MOTION TO DISMISS

Date: September 24, 2008

Time: 9:00 a.m.

Place: Courtroom 3, 17th Floor

Judge: Hon. Phyllis J. Hamilton

I. INTRODUCTION

Andresita Boyle ("Plaintiff") submits this memorandum of law in opposition to Nelson, Watson and Associates' 12(b)(6) Motion To Dismiss.

Plaintiff has alleged in her Complaint facts that, when accepted as true, state claims upon which relief can be granted under the federal and state Fair Debt Collection practices Acts (15 U.S.C. § 1692 *et seq.* and Cal. Civ. Code § 1788 *et seq.*

Plaintiff includes the following factual information and legal arguments in support of her motion in opposition to Defendant's Motion To Dismiss.

II. STATEMENT OF FACTS

Plaintiff was in debt to Washington Mutual Bank on a credit card used to purchase consumer goods and services for her personal needs¹ (Cmpl't, ¶ 13).

Washington Mutual sold the account to Arrow Financial, who sent Plaintiff 3 collection

¹Washington Mutual purchased the account from Providian National Bank.

1 letters, consisting of all of the letters attached to the Complaint as Exhibits B, D, and F, all of
 2 which stated the same following notice:

3 **As required by law**, you are hereby notified that a negative credit
 4 report reflecting on your credit record may be submitted to a credit
 5 reporting agency if you fail to fulfill the terms of your credit
 6 obligations. [Emphasis added.]

7 The above notification is hereafter referred to as “legal requirement”.

8 This “legal requirement” notice was repeated in the 4th letter sent to Plaintiff by
 9 Defendant Nelson, Watson & Associates, LLC (hereafter “Defendant”), as shown at Exhibit G to
 10 the Complaint.

11 Plaintiff will show that the law Defendant refers to is California and federal law, both of
 12 which mandate only that the “legal requirement” notice be given to the consumer once, before
 13 giving a negative credit report, with the result that subsequent negative credit reports can be
 14 made without giving an additional notice.

15 The California statute, at Cal. Civ. Code § 1785.26(b), states:

16 (b) A creditor may submit negative credit information concerning a
 17 consumer to a consumer credit reporting agency, only if the
 18 creditor notifies the consumer affected. **After providing this
 19 notice, a creditor may submit additional information to a
 20 credit reporting agency respecting the same transaction or
 21 extension of credit that gave rise to the original negative credit
 22 information without providing additional notice.** [Emphasis
 23 added.]

24 A similar provision is in federal law at 15 U.S.C. § 1681s-2(a)(7), which states:

25 (7) Negative information.

26 (A) Notice to consumer required.

27 (i) In general, if any financial institution that extends
 28 credit and regularly and in the ordinary course of business
 furnishes information to a consumer reporting agency described in
 section 603(p) [15 U.S.C. § 1681a(p)] furnishes negative
 information to such an agency regarding credit extended to a
 customer, the financial institution shall provide a notice of such
 furnishing of negative information, in writing, to the customer.

(ii) **Notice effective for subsequent submissions.** After
 providing such notice, the financial institution may submit
 additional negative information to a consumer reporting agency
 described in section 603(p) [15 U.S.C. § 1681a(p)] with respect to
 the same transaction, extension of credit, account, or customer
without providing additional notice to the customer. [Emphasis
 added.]

Discovery will show that the legal requirement notice was given once by the Plaintiff's creditor, and that the subsequent notices were used to coerce payment of the alleged debt.

III. STATEMENT OF ISSUES

1. Did Defendant, in its attempt at collecting a debt allegedly owed its principal, Defendant Arrow Financial, violate 15 U.S.C. §§ 1692e, 16192e(10), and 1692f, by falsely stating that the law requires it to make the following statement?

As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.

2. Did Defendant, and/or its principal, Arrow, use the legal requirement notice in its four collection letters as a means to coerce payment of the alleged debt?

3. Did the Defendant, or its principal, Arrow, make a negative credit report after giving its legal requirement notice?

IV. ARGUMENT

A. THE COURT CONSIDERS A MOTION UNDER 12(b)(6) UNDER WELL-ESTABLISHED RULES.

When deciding a motion to dismiss, a district court must accept the facts alleged in the complaint as true. *Scheuer v. Rhoades*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L. Ed.2d 90 (1974). When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), " ... all allegations of material fact are taken as true and are construed in the light most favorable to Plaintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Generally, the complaint should not be dismissed unless it appears that Plaintiff can prove no set of facts that would entitle Plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L. Ed. 2d 80 (1957).

Plaintiff has set forth facts in the complaint which must be accepted as true for the purpose of deciding Defendants' Motion to Dismiss.

B. THE STRUCTURE OF THE FDCPA.

The purpose of the FDCPA is to " protect consumers from a host of unfair harassing and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors." S. Rep. No. 382, 95th Cong. 1st Sess. 1-2 reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 1696. The FDCPA does this primarily by regulating the manner and timing of debt collector's contacts with alleged debtors and others. Also, the Act prohibits debt collectors from using false, deceptive and misleading representations in debt collections, including the false representation that a communication is from an attorney, 15 U.S.C. § 1692e(3). *Clomon v. Jackson*, 998 F. 2d 1314, 1320 (2d Cir. 1993). The Act contains a civil enforcement mechanism which provides that any debt collector who fails to comply with any provision of the Act with respect to any such person is liable to such person. 15 U.S.C. § 1692k. Strict adherence to the Act's explicit terms are required. *Baker v. GC Services, Corp.*, 677 F.2d 775, 778 (9th Cir. 1982).

C. THE COLLECTOR'S LETTER IS ANALYZED FROM THE PERSPECTIVE OF THE LEAST SOPHISTICATED CONSUMER.

The Supreme Court as far back as 1937, stated:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character nor take away its power to deceive others less experienced.

Federal Trade Commission v. Standard Education Soc., 302 U.S. 112, 116; 58 S.Ct. 113, 115; 82 L. Ed. 141 (1937).

The Ninth Circuit Court rule is that a collection letter is analyzed from the prospective of the " least sophisticated consumer."

[W]e evaluate the threatened conduct . . . under the least sophisticated consumer standard. Although this standard is objective, the standard is lower than simply examining whether particular language would deceive or mislead a reasonable debtor. *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222, 1225; Also, see *Terran v. Kaplan*, 109 F.3d 1428, 1431-32, (9th Cir. 1997); *Renick v. Dun & Bradstreet Receivable Management Services*, 290 F.3d 1055 (9th Cir. 2002).

D. ONLY ONE NOTICE TO A CONSUMER IS REQUIRED.

The law requires only one notice to a consumer of a negative credit reporting to the credit bureau. Defendant's repeated representation of the legal requirement is false, deceptive, and misleading.

Plaintiff has set forth, in her statement of the facts, the statutory requirement of a creditor notifying a consumer that a credit default will result in a negative report to the credit bureau. Notice of subsequent negative credit reports are not required to be given to the consumer. Defendant's statement in the collection notices that the notice is required in each successive letter is false.

Defendant's use of the legal requirement notice is a tool used to induce payment of an alleged debt. Reporting a debt to a credit bureau is "a powerful tool designed in part to wrench compliance with payment terms. *Rivera v. Bank One*, 145 F.R.D. 614, 623 (D. P. R. 1993); *In re Sommersdorf*, 139 B.R. 700, 701 (Bankr S.D. Ohio 1991); *Forsberg v. Fidelity National Credit Services Ltd.*, 2004 U. S. Dist. LEXIS 7622#16 (S.D. Cal. 2004).

The false representations as to the legal requirement made by Defendants violate the debt collection statutes. Defendant had no legal obligation to issue the "legal requirement" notice. The notice was false and misleading, and stated to coerce payment of the alleged debt.

On this basis, Defendant's Motion To Dismiss is without merit and must be denied.

E. USE OF A "LEGAL REQUIREMENT" NOTICE IS COERCIVE WHERE NO LEGAL REQUIREMENT EXISTS.

The first collection letter sent to Plaintiff with the "legal requirement" notice satisfied the notice statute. The subsequent letters used the "legal requirement" notice to coerce payment.

The first letter from Defendant's principal, Arrow Financial, states it purchased Plaintiff's debt from Washington Mutual (Cmplt., Exhibit A). That collection letter set forth the "legal requirement" notice (Cmplt., Exhibit B). Arrow followed the legal requirement stated in its notice, and the subsequent 3 notices were not required. Defendant was bluffing in repeating the "legal requirement" notice on the 3 subsequent letters, and was using the notice only to coerce payment of the alleged debt. Defendant's conduct violated 15 U.S.C. §§ 1692e, 1692e(10), and

1 1692f.

2 **F. TO IMPLY MULTIPLE TIMES THAT A DEBT WOULD BE REPORTED**
 3 **TO THE CREDIT BUREAU IS FALSE, DECEPTIVE, AND**
 4 **MISLEADING.**

5 The false implication that the collector might take steps to report the debt to the credit
 6 bureau violates the FDCPA at 15 U.S.C. § 1692e. *Creighton v. Emporia Credit Service*, 981
 7 F.Supp. 411, 416 (E.D.VA. 1997). Defendant argues that a statute allowed the negative credit
 8 reporting (Mot. 4:18-21; 5:2-25). This is not a defense where the statute is used to deceive the
 9 consumer, particularly where Defendant did nothing to act on its alleged right to make the
 10 negative credit notice. *Drennan v. Van Ru Credit Corp.*, 950 F.Supp. 858, 861 (N.D. IL. 1996).

11 Applying the 9th Circuit “least sophisticated consumer” standard, a consumer would
 12 believe such an assertion of the legal requirement to make a negative credit report and that
 13 Defendant would do so. Discovery will show Defendant failed to do so, and even had it done so,
 14 the subsequent notices were not required.

15 **G. DEFENDANT’S MOTION SEEKS TO SIDESTEP THE CHALLENGED**
 16 **CONDUCT BY A NARROW APPEAL TO CONGRESSIONAL INTENT**

17 At page 6 of Defendant’s motion, Defendant offers a discourse on the purpose and intent
 18 of the FDCPA, stating that reference necessarily must be made to the purpose and intent of the
 19 FDCPA statutory scheme itself (Mot. 6:2-4). Defendant then continues by offering its view that
 20 Congress sought to stop abusive debt collection tactics (Mot. 6:8-9). Defendant then continues at
 21 page 7 with its limited review of what Congress intended in enacting the FDCPA.

22 In making these statements, Defendant relies on the limited idea that deception in debt
 23 collection involves only the use of obscene or profane language, threats of violence, and
 24 telephone calls at unreasonable hours (Mot. 7:8-10). This limited view of the statute is
 25 unsustainable.

26 Pursuant to the above, Defendant’s Motion To Dismiss should be denied.

1 **V. CONCLUSION**

2 Plaintiff asks this honorable court to deny Defendant's motion and allow Plaintiff to
3 proceed with this lawsuit.

4
5 Dated: 9/3/08

/s/

Irving L. Berg
THE BERG LAW GROUP
ATTORNEY FOR PLAINTIFF